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IN THE

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

-v-

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

Amicus the State of New York is concerned about the potential impact of the Court's ruling in this case on several transferable development rights programs throughout the State. An overly-broad ruling, along the lines suggested by the petitioner, could adversely affect New York's programs. Given the differences among the numerous transferable development rights programs throughout the country, New York State respectfully urges the Court to tailor any holding regarding transferable development rights to the program before it.

The State has enacted a number of statutes that provide for the transfer of economically beneficial uses from one parcel of property to another. For example, the Legislature amended the Town Law to provide each municipality throughout the State with the authority to establish a Transferable Development Rights program. *See* Town Law § 261-a. Also, the Adirondack Park Agency Act permits adjacent parcels to aggregate their development rights on a single parcel. *See* Executive Law § 809(10)(c). Moreover, New York City's historic preservation regulations include a transferable development rights program.

In addition to these varied programs, the New York State Legislature recently enacted a comprehensive land use statute for the Central Long Island Pine Barrens (the "Act") that provided for the development and implementation of a voluntary transferable development rights program. *See* Environmental Conservation Law ("ECL") Article 57 (McKinney's 1996 Supp.). The Act, which we describe in some detail, has two central goals: (1) to protect the quality of Long Island's drinking water; and (2) to preserve the unique ecosystem of the Long Island Central Pine Barrens for present and future generations. ECL § 57-0105.

A. The Long Island Aquifer and the Central Pine Barrens Ecosystem

There can be no dispute about the critical importance of the Long Island aquifer and the fire-prone Central Pine Barrens ecosystem. The United States Environmental Protection Agency has determined that Long Island's sole-source aquifer provides the "sole or principal drinking water supply" for the area's 2.5 million citizens and "is vulnerable to contamination." *See* 43 Fed. Reg. 26611-12 (June 21, 1978). Given that the Long Island aquifer is the principal source of drinking water for Nassau and

Suffolk Counties, the EPA determined that the contamination of the aquifer "would create a significant hazard to public health." *Id.* at 26612. The New York State Legislature has long sought to protect this vital resource. For example, in 1987, the Legislature enacted the Sole Source Aquifer Protection Law, ECL Article 55, to assist in comprehensive planning to protect the water quality of the Long Island aquifer. ECL § 55-0101.

Four years ago, in *Long Island Pine Barrens Society, Inc., v. Planning Bd. of the Town of Brookhaven*, 80 N.Y.2d 500, 591 N.Y.S.2d 982 (1992), the New York Court of Appeals summarized the fragility and critical environmental attributes of the Central Pine Barrens. 80 N.Y.2d at 510-11, 591 N.Y.S.2d at 985-86. The Court stated that "[t]he Pine Barrens' singular geological and meteorological history, as well as its highly unusual soil, vegetation and water levels, make it particularly hospitable to a wide variety of life forms whose survival could well be threatened by development." 80 N.Y.2d at 509, 591 N.Y.S.2d at 984-85. The Court also recognized that the "Pine Barrens is an indispensable component of the aquifer system that is the sole natural source of drinking water for over two and a half million inhabitants of Long Island," 80 N.Y.2d at 508, 591 N.Y.S.2d at 984, and is:

> especially vulnerable to the risk of pollution, since its permeable soil is not readily capable of filtering or degrading contaminants. As is indicated by at least one study, once the deep recharge system in this area becomes contaminated, it would take centuries to flush it sufficiently to return it to clean groundwater quality. Thus, as a practical matter, contamination would be irreversible. . . . It is thus apparent that the protection of the Pine Barrens region from sources of pollution is vital to the health of Long Island's human population.

80 N.Y.2d at 509, 591 N.Y.S.2d at 984-85.

While holding that a cumulative environmental impact statement covering 224 development projects was not mandated by the State Environmental Quality Review Act ("SEQRA") regulations, 80 N.Y.2d at 517, 591 N.Y.S.2d at 990, the Court stated that "an exhaustive and thorough approach to evaluating projects affecting [the Central Pine Barrens] is unquestionably desirable and, indeed, may well be essential to its preservation. . . ." 80 N.Y.2d at 515, 591 N.Y.S.2d at 988. The Court recognized "the need for centralized planning by a single regional agency" and called for a legislative resolution to the problems caused by piecemeal development stating that "the solution must be devised by the Legislature, which is responsible for crafting sensible deadlines and mandating prompt action by the designated planning bodies to address this matter of urgent public concern." 80 N.Y.2d at 516, 518, 519 N.Y.S.2d at 989, 990.

B. The Long Island Pine Barrens Protection Act

Soon thereafter, the New York State Legislature enacted L. 1993, c. 262, 263. *See also* L. 1996, c. 145. The Legislature declared that the protection of Suffolk County's Pine Barrens, especially the area known as the Central Pine Barrens, is of "critical" importance to the State because it lies over "the largest source of pure groundwater in New York" and "contains one of the greatest concentrations and diversities of endangered, threatened and special concern species of plants and animals to be found in the state," ECL § 57-0105, and that the area's "hydrological and ecological integrity is endangered," ECL § 57-0119(1). The Act divided the Central Pine Barrens into two areas known as the Core Preservation Area and the Compatible Growth Area, ECL §§ 57-0105, 57-0107 (10),(11), required the

preparation of a state-supported Central Pine Barrens Comprehensive Land Use Plan (the "Plan"), ECL § 57-0105, and established the Central Pine Barrens Joint Policy and Planning Commission "to plan, manage and oversee land use" within the Pine Barrens. ECL § 57-0119 (1), (2), (6). In accordance with the Act, the Commission prepared the Plan which subsequently was adopted by the involved towns and Suffolk County. Governor Pataki signed the Plan on June 28, 1995.

The Act and the Plan permit agricultural, recreational, and some residential uses within the Core Preservation Area. ECL § 57-0121(3); L. 1996, c. 145. Also, landowners who wish to develop property within the Core Preservation Area may apply for a development permit for any land use, and the Commission may permit such use pursuant to the Act. ECL §§ 57-0123(3); 57-0121(10). The Act specifically provides that, like other administrative actions, the Commission's permit determinations are reviewable in state court proceedings, and should the court find a taking, the Commission must either permit the requested development or pay for the acquisition of the property interest in question. ECL § 57-0135; CPLR Article 78.

C. The Long Island Pine Barrens Credit Program

In addition to the uses discussed above, and because the Plan's land use regulations may limit the value of some lands, a new use right under the Pine Barrens Credit Program was established for all privately owned property in the Core Preservation Area. Specifically, the Pine Barrens Credit Program vests in Core Preservation Area real property the right to transfer development potential or "development rights" to other property designated for more intense development upon receipt of Pine Barrens Credit. ECL § 57-0105; *see also* ECL § 57-0121(6)(m); ECL § 57-0119(6)(j), (p). Pursuant to the Act, the Plan identified

"Sending Districts" within the Core Preservation and Compatible Growth Areas, and "Receiving Districts" outside of the Core Preservation Area. ECL § 57-0121(6)(f). The Act also directed the Commission to establish a system generally referred to as the "Development Rights Bank"—a system whereby values are set and standards established with respect to the purchase, sale, ownership, and transfer of development rights. ECL § 57-0119(6)(j); ECL § 57-0119(7)(b); ECL § 57-0121(6)(f). Accordingly, the Plan established a Pine Barrens Credit Clearinghouse to facilitate the transfer of development rights from the sending areas to receiving areas through the issuing, monitoring, brokering, purchasing, and selling of credits.

Obtaining Pine Barrens Credits for sending area property is a two-step process. First, an owner may request and receive a Letter of Interpretation issued by the Pine Barrens Credit Clearinghouse which determines the number of Pine Barrens Credits generated by an individual tax parcel. This document specifies the total number of credits that may be allocated to a given parcel of property in the sending area. Pine Barrens Credits are allocated to property in the sending areas based upon a set formula that takes into account a parcel's size and zoning category (prior to the Plan's enactment).[1] As of December 20, 1996, 219 Letters of Interpretation allocating 221 Pine Barrens Credits were issued for Core Preservation Area parcels within the three towns.

Having obtained a Letter of Interpretation for the property, the landowner may proceed to the second step, obtaining a Pine

[1]The program also incorporates an appellate process by which a property owner may seek and obtain a greater allocation of Pine Barrens Credits if the owner is dissatisfied with the allocation established by the formula.

Barrens Credit Certificate. A landowner obtains a certificate by recording a conservation easement for the sending area property. The conservation easement permanently limits the future uses of the sending area parcel as defined in the conservation easement.[2] The owner then receives the Certificate following the recording of the conservation easement with the County Clerk. For the majority of small property landowners, participation in the Pine Barrens Credit Program will not involve any out-of-pocket expenses. In exchange for the conservation easement, the Pine Barrens Credit Certificate permits certain land uses to be transferred to the receiving area.

Landowners who have received a Pine Barrens Credit Certificate may use the credit in one of several ways. First, landowners can sell the Certificate directly to the Clearinghouse, and the Commission established the prices that the Clearinghouse will pay for Pine Barrens Credits. The Clearinghouse will purchase Pine Barrens Credit Certificates from any Core Preservation Area property owner wishing to sell one or more Pine Barrens Credit Certificate(s) or a portion thereof. The Clearinghouse has a five million dollar revolving fund to purchase Certificates. Any Pine Barrens Credits purchased by the Clearinghouse can then be sold by the Clearinghouse, and the proceeds from such sales will be reinvested by the Clearinghouse to replenish the fund and to purchase future Pine Barrens Credit Certificates. ECL § 57-0119(6)(j).

[2]Once a conservation easement is recorded and the Pine Barrens Credits are transferred, the sending parcel is entitled to a reduction in assessed value under the Town Law §261-a(2)(d), and a corresponding reduction in real property taxes will result.

Second, holders of Pine Barrens Credit Certificates could also sell their credits to another landowner or developer on the private market. The value of a credit lies in the ability to redeem it for the right to increase development beyond that permitted by current zoning. To facilitate the development of this private market and to match interested buyers with interested sellers of Pine Barrens Credits, the Clearinghouse publishes on a monthly basis the Pine Barrens Credit Registry. *See* ECL § 57-0121(6)(f). A third option for an owner of property in both the sending and receiving areas is to transfer the credits from the sending parcel to the receiving parcel.

Notably, the Plan ensures that holders of Pine Barrens Credit Certificates may convert that certificate into an actual land use in the receiving area "as of right" by providing that "the redemption of Pine Barrens Credits entitles a person to an increase in intensity or density in accordance with this Plan . . . with no additional special permit required" within the same town. *See* Plan at § 6.4.1.1.

ARGUMENT

TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS, INCLUDING THE PINE BARRENS CREDIT PROGRAM, PROTECT ECONOMICALLY BENEFICIAL USES OF PROPERTY

Should the Court reach the merits of the respondent's transferable development rights program, New York urges the Court to follow the teachings of its landmark ruling in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 137 (1978), *affirming*, 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977), and reconfirm that properly designed transferable development

rights programs provide economically beneficial uses.[3] In contrast, petitioner's overly-broad attack, by ignoring both *Penn Central* decisions and the fact that the transferable development rights *are* of value to the petitioner, could undermine land use programs that seek to protect watershed areas, farmland, and open space. Petitioner seems intent on shoehorning this case into either *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or an onerous troop deployment. Pet. Br. at 32-3. Neither scenario applies to this case in particular or transferable development rights programs in general: *Lucas* was grounded on the factual finding by the state trial court that the Beachfront Management Act "rendered [the two lots] valueless," 505 U.S. at 1009, while the Third Amendment protects against such hypothetical troop deployments. In contrast, here the property retains value and there has been no physical invasion either by the public or troops. Aside from physical invasions and regulations involving the destruction of *all* value, the Court has eschewed a rigid, bright-line test in favor of an "ad hoc, factual inquir[y] into the circumstances of each particular case."

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[3]New York submits that the Ninth Circuit correctly decided the ripeness question. Petitioner's counsel, it seems, would like to have it both ways. On the one hand, they would like to press a legal challenge and bypass the respondent planning agency's review of the actual transfer of petitioner's economically beneficial uses. On the other hand, petitioner's unilateral decision not to apply for the transfer of her economically beneficial uses prevented the agency from fulfilling its duty to review the actual transfer of petitioner's valuable beneficial uses, and thus permitted her counsel to argue that the program is a "ruse." *See Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359, 363 (9th Cir. 1996); Pet. Br. at 9 (questioning "if any [recipients] can be found"). Thus, petitioner, by her unilateral actions, has forced the agency to defend a legal challenge and impeded it from responding to her allegations.

Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 643 (1993).

A number of transferable development rights programs exist throughout New York State, *e.g.*, *Penn Central*, 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977), *affirmed*, 438 U.S. 104 (1978), and throughout the nation, *e.g.*, *Gardner v. New Jersey Pinelands Commission*, 125 N.J.193, 593 A.2d 251 (1991). State and local governments, each "serv[ing] as a laboratory," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), are searching for innovative ways to address competing land use, planning, and environmental issues. Each transferable development rights program is distinct, with different components and procedures, and designed to address different situations. Consistent with well established Fifth Amendment jurisprudence, each of these programs must be analyzed on its own particular facts.

Properly constructed transferable development rights programs do not deprive property owners of all economically beneficial uses of their property. Rather, such programs, like the Pine Barrens Credit program, ensure that the economically beneficial use is transferred to other parcels of land. *Penn Central*, 42 N.Y.2d at 334, 397 N.Y.S.2d at 920. Transferable development rights programs do not leave the transferable economically beneficial use in "legal limbo." *Penn Central*, 42 N.Y.2d at 336, 397 N.Y.S.2d at 921; *Fred French Investing Co. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, *cert denied*, 429 U.S. 990 (1976). Some programs incorporate a bank or clearinghouse that stands ready to purchase certificates or rights from willing landowners and thereby provide greater certainty. *Id.* Other programs include clearly delineated receiving areas. *Id.*

Twenty years ago, in rejecting a challenge to New York City's historic preservation regulations, the New York Court of Appeals ruled that the transfer of such economically beneficial uses "may be considered as part of the owner's return on the property." *Penn Central*, 42 N.Y.2d at 328, 397 N.Y.S.2d at 916. In affirming the New York Court of Appeals, this Court recognized that landowners retained "valuable" uses under the historic preservation and transferable development rights program, and that, therefore, they were not denied all use of any so-called "pre-existing air rights." 438 U.S. 104, 137. Specifically, the Court stated that the "ability to use those rights has not been abrogated; they are made transferable to at least eight other parcels in the vicinity. . ." *Id.* Moreover, the landowner's retention of such valuable uses under the transferable development rights program "nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Id.* The same rationale should apply with equal force to the present case and in other cases involving transferable development rights programs.

CONCLUSION

Despite petitioner's criticisms on the Tahoe Regional Planning Agency's transferable development rights program, the record in this case demonstrates that her Mill Creek property provides her with valuable, economically beneficial uses. Accordingly, there is no categorical taking.

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Dated: Albany, New York
January 9, 1997

Respectfully submitted,

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